

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,

v.

DONTE JACOBS,

Defendant.

Criminal Action No. 16-78-RGA

ORDER

Defendant filed a motion to suppress statements. (D.I. 77). The Government filed a response. (D.I. 83). I held an evidentiary hearing and argument on April 3, 2019.

The thrust of Defendant's argument is that an agreement he and his counsel signed with the Government should not be enforced. To do so, he argues, would limit his Sixth Amendment right to cross-examination at trial, which right he did not knowingly and intentionally waive.

I. BACKGROUND

The issue arises because Defendant signed a proffer statement and gave three proffers, with counsel present, on July 26, 2016, July 29, 2016, and August 22, 2016. The Government represents that the proffered statements included highly inculpatory statements that it will offer at trial if Defendant breaches the proffer agreement.¹ The relevant portion of the proffer agreement states:

The United States may use any statements made or information provided by your client, or on his behalf, during the Interview to cross-examine your client at trial or any other legal proceeding if your client testifies. Moreover, statements made during the Interview and any information derived directly or indirectly from your client's statements may be used to rebut any evidence offered by, or on behalf of, your client in any legal proceedings against his [sic].

¹ The Government represented at the evidentiary hearing that it will not seek to admit any statements from the July 26, 2016 proffer session. Defendant, however, continues to move to suppress those statements.

GX-2.²

At the evidentiary hearing, I heard testimony from three witnesses: Mr. Edelin, Defendant's counsel during the proffer sessions, Agent Giallombardo, a DEA Agent present at the proffer sessions, and Defendant.

A. Mr. Edelin's Testimony

Mr. Edelin has been a criminal defense attorney since 1996 and has represented approximately 100 federal defendants. (Hr'g Tr. 6:11-20, 7:4-10). As a defense attorney, he has regularly conducted proffers with federal defendants and is familiar with the proffer process. (*Id.* at 7:16-24). Early in his representation of Defendant, they discussed the possibility of cooperating with the government. (*Id.* at 12:7-15).

On July 26, 2016, AUSA de Barrena-Sarobe, Mr. Edelin, and Defendant discussed the proffer agreement in the holding cell of the Federal Courthouse. Defendant was unable to read or sign the Proffer Agreement because of the holding cell set-up. At this meeting, Mr. Edelin briefly explained the proffer agreement, but did not read the entirety of the letter to Defendant. (*Id.* at 12:20-14:2, 23:8-24; D.I. 83, Ex. A).

On July 29, 2016, the parties signed and backdated the proffer agreement to cover the discussions on July 26, 2016. (Hr'g Tr. at 15:2-22; GX-2). Mr. Edelin explained the proffer agreement to Defendant in private before Defendant signed it. (Hr'g Tr. at 17:20-22; GX-3). Mr. Edelin went over the terms of the Proffer Agreement more thoroughly than at the July 26 session because there was more time. (Hr'g Tr. at 25:16-19). Defendant was given the Proffer Agreement to read over while Mr. Edelin explained it. It appeared to Mr. Edelin that Defendant read over it at that time, but he could not say whether Defendant read the entire document. (*Id.* at 25:1-8; 31:7-

² As described to the Court, the text of the proffer agreement was in the form routinely used by the U.S. Attorney's Office in this District.

10). Mr. Edelin testified that he explains the Proffer Agreement to his clients in the following manner:

A proffer is an off-the-record conversation between us and the government, that we will be signing a proffer letter and it serves as a contract between us and the government. . . . [I]t protects whatever he or she says in that meeting. Meaning that their words can't be used against them in court by the government. I explained that there are two exceptions. One, the government can make derivative use, meaning they can investigate what we say. And, and number two, if the client or the client instructs somebody to say something different than what was said in the proffer, then the government will call the agent that was taking notes and put them on the stand and explain to the court what was said differently.

(*Id.* at 16:2-23). Mr. Edelin did not explain the Proffer Agreement in terms of specific named rights, but gave an explanation of the terms of the proffer agreement and its consequences. (*Id.* at 21:10-22:1). Mr. Edelin did not have a specific recollection of explaining the proffer agreement to Defendant, but testified that he consistently explains proffer agreements in this way to his federal defendant clients and has no reason to believe that he did not explain it this same way to Defendant. (*Id.* at 17:9-19).

Mr. Edelin also did not remember any indication that Defendant did not understand what was going on at the proffer session or the consequences of the Proffer Agreement. (*Id.* at 19:8-20:15). Defendant was asked repeatedly whether he understood the terms of the proffer agreement and whether he wanted to proceed. (*Id.* at 29:21-30:9).

B. Agent Giallombardo's Testimony

Agent Giallombardo was not present at the July 26, 2016 proffer session. (*Id.* at 40:7-13). His recollection of the events of the July 29 and August 22 proffer sessions was consistent with Mr. Edelin's testimony. (*Id.* at 37:22-38:1). Defendant's proffer sessions were the first time in Agent Giallombardo's career that he had sat in on a federal proffer session. (*Id.* at 33:19-24). In his experience, after a defendant reviews the proffer agreement with his attorney, AUSA de

Barrena-Sarobe asks the following questions: (1) whether the defendant understands the terms of the agreement, (2) whether the defendant has had time to confer with his attorney and ask any questions he might have. (*Id.* at 34:9-21). AUSA de Barrena-Sarobe asked Defendant these questions. (*Id.* at 35:24-36:9). Finally, he testified that nothing about Defendant's manner at the proffer session indicated that Defendant was having difficulty understanding the proffer agreement. (*Id.* at 36:14-37:7).

C. Defendant's Testimony

Defendant testified to the following. At the July 26, 2016 meeting, no one explained what a proffer was or the terms of the proffer agreement to Defendant. (*Id.* at 46:18-47:2). At the July 29, 2016 meeting Defendant was given an opportunity to read the proffer agreement, but he skimmed the agreement rather than reading it in its entirety. (*Id.* at 48:7-13). Defendant believes he has a fifth or sixth grade reading level and stated that no one read the letter to him. (*Id.* at 54:16-19). Further, Defendant testified that he did not understand that he was giving up any rights, that he was afraid of the possible sentence, and only signed the agreement because his lawyer told him it was the best thing for him. (*Id.* at 47:23-48:1, 48:16-49:1). He also testified that he was not given the opportunity to talk to Mr. Edelin in private on July 29. (*Id.* at 57:2-12). According to Defendant, no one inquired as to his state of mind or whether he was under the influence of any substance. (*Id.* at 47:7-17). However, on cross-examination, he testified that he was not under the influence at the time of the proffer session, nor did he inform anyone that he did not understand what was going on. (*Id.* at 50:1-3, 51:2-5, 51:10-11). Finally, he testified that at the August 22 proffer session he told Mr. Edelin in private that he did not want to have the proffer meeting, but agreed to go through with the meeting after Mr. Edelin reminded him that he was facing a mandatory twenty-year sentence. (*Id.* at 51:10-52:23).

II. DISCUSSION

First, Defendant contends that the Proffer Agreement impermissibly impairs his ability to present a meaningful defense under the Sixth Amendment. I disagree with Defendant. Courts have regularly upheld proffer agreements containing substantially similar provisions to the challenged paragraph here. *See United States v. Bogle*, 522 F. App'x 15, 18 (2d Cir. 2013); *United States v. Burnett*, 2009 WL 2180373, at *4 (E.D. Pa. July 17, 2009). Moreover, courts have rejected Sixth Amendment challenges to such provisions because “defense counsel can still present a meaningful defense without opening the door to the admission of the proffer statements because the Proffer Agreement does not preclude the defense from challenging the credibility of the Government’s witnesses or the weight and sufficiency of the Government’s evidence.” *United States v. Avendano*, 2003 WL 22454664, at *4 (S.D.N.Y. Oct. 29, 2003) (citing *United States v. Gomez*, 210 F. Supp. 2d 465, 476 (S.D.N.Y. 2002)). Therefore, I do not find the Proffer Agreement to be a violation of the Sixth Amendment.

Second, Defendant argues that the Proffer Agreement is unenforceable because he did not knowingly and voluntarily enter into the agreement. “A proffer agreement is a contract and its terms must be read to give effect to the parties’ intent.” *United States v. Hardwick*, 544 F.3d 565, 570 (3d Cir. 2008). It is the Government’s burden to demonstrate by a preponderance of the evidence that Mr. Jacobs knowingly and voluntarily signed the Proffer Agreement, thereby contractually waiving his right to exclude statements made at the proffer sessions. *United States v. Mayfield*, 361 F. App'x 425, 431 (3d Cir. 2010) (citing *Colorado v. Connelly*, 479 U.S. 157, 168-69 (1986)). However, a defendant must put forward some “affirmative indication that the agreement was entered into unknowingly or involuntarily.” *United States v. Mezzanatto*, 513 U.S.

196, 210 (1995). To show that waiver was voluntary and knowing, the Government must show the following components:

First, the waiver must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it.

United States v. Velasquez, 885 F.2d 1076, 1084 (3d Cir. 1989).

The record in this case clearly demonstrates that Defendant knowingly and voluntarily waived his rights by signing the Proffer Agreement. I credit Mr. Edelin's testimony as to how the proffer agreement was explained to Defendant, when it was explained, and that Defendant did not indicate directly or indirectly that he did not understand the Proffer Agreement. Mr. Edelin's lack of specific recollection of explaining the Proffer Agreement to Defendant does not diminish the credibility of his statement as he testified that he regularly explains such agreements to clients. *See United States v. Parra*, 302 F. Supp. 2d 226, 235 (S.D.N.Y. 2004) (court accepted testimony that terms were explained such that Defendant could understand despite inability to remember precise language used). Moreover, Agent Giallombardo's testimony is consistent with Mr. Edelin's statements. I do not credit Defendant's unsupported testimony that the proffer agreement was not explained to him or that he was not given time to privately discuss the proffer agreement with Mr. Edelin. It is undisputed that Mr. Edelin did not explain the proffer agreement in terms of "rights" and did not read the entire agreement verbatim to Defendant.

The Government has proven by a preponderance of the evidence that Defendant's consent to the Proffer Agreement was knowing and voluntary. There is no affirmative indication in the record that Defendant did not understand Mr. Edelin's explanation. Waiver can be knowing and voluntary where Defendant has been provided "a detailed and accurate explanation, in layman's terms, of the content and operation of the provisions of the Proffer Agreement." *Avendano*, 2003

WL 22454664, at *7. In fact, the use of lay terminology is a better means to increase the defendant's understanding of the agreement and its consequences rather than simply reading the technical terms of the agreement. Moreover, it is undisputed that Defendant was given an opportunity to read the full Proffer Agreement and understood that by signing it, he was representing that he understood the agreement. *See Avendano*, 2003 WL 22454664, at *7 (defendant and attorney given time to consult with interpreter on Proffer Agreement).

Additionally, it is not necessary that Defendant understood every single right that he is giving up by signing the Proffer Agreement for the waiver to be knowing. As long as Defendant was cognizant that there was some right he was giving up, his agreement will be considered knowing. *Bogle*, 522 F. App'x at 18 (explanation that statements could be used if Defendant took the stand or to rebut argument counsel made at trial was sufficient); *United States v. Krilich*, 159 F.3d 1020, 1026 (7th Cir. 1998) ("A defendant's understanding of the consequences of his waiver need not be perfect; it was [the defendant's] understanding of the rights being relinquished, not of all the possible repercussions of relinquishing them, that made his waiver knowing."). Thus, it is immaterial to the "knowing" prong that Mr. Edelin did not frame the discussion of the proffer agreement in terms of specific "rights." Here, the record shows that Mr. Edelin explained to his client the challenged paragraph of the Proffer Agreement, and specifically, that the government could use these statements if Defendant or others instructed by Defendant made statements contradicting Defendant's statements from the proffer session. At no time during the *multiple* proffer sessions did Defendant inform anyone that he did not understand the Proffer Agreement or its consequences. There has been no testimony that Defendant did not understand Mr. Edelin's explanation of the Proffer Agreement. Mr. Edelin's explanation of the Proffer Agreement made the nature of the right that Defendant gave up by signing the Proffer Agreement clear: the ability

to exclude statements made at the proffer sessions. Therefore, I determine that Defendant's consent to the proffer agreement was knowing. *See Bogle*, 522 F. App'x at 18; *Burnett*, 2009 WL 2180373, at *4; *Avendano*, 2003 WL 22454664, at *7.

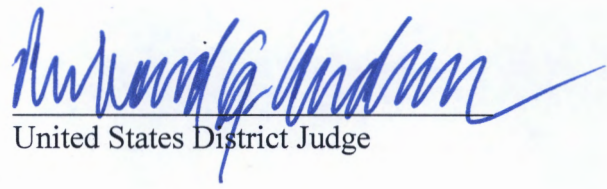
The record also contains no affirmative indication that Defendant's consent to the Proffer Agreement was involuntary. Defendant testified that he was afraid of the possible sentence and agreed to sign the Proffer Agreement because his counsel told him it was in his best interest. These facts, without more, do not rise to the level of "intimidation, coercion, or deception" that would make Defendant's agreement involuntary.

Therefore, I determine that Defendant's waiver was knowing and voluntary, and the proffer agreement is enforceable.

III. CONCLUSION

Thus, it is hereby ordered that Defendant's Motion to Suppress (D.I. 77) is DENIED.

Entered this 21 day of May, 2019.


United States District Judge